Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-115

JERRY DI DONATO,

Appellant,

vs.

CHARLES FELDMAN and
WILLIAM FELDMAN,

Respondents.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA, SECOND
APPELLATE DISTRICT, DIVISION THREE

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

JERRY DI DONATO,

Appellant,

vs.

CHARLES FELDMAN and
WILLIAM FELDMAN,

Respondents.

JURISDICTIONAL STATEMENT

JERRY DI DONATO, having appealed the decision of the Court of Appeal of the State of California, Second Appellate District, Division Three, pursuant to 28 U.S.C. section 1257(2), hereby submits his jurisdictional statement pursuant to Rules 13(2) and 15 of the Supreme Court Rules.

OPINIONS BELOW

The Superior Court of the State of California for the County of Los Angeles entered a default judgment against appellant on November 19, 1973 in the sum of

$14,079.22. No opinion was rendered thereon. A copy of the Judgment is appended hereto as Appendix A. Appellant appealed the judgment to the Court of Appeal of the State of California, Second Appellate District, Division Three, which affirmed the judgment by a written opinion filed February 27, 1975. The opinion is not published and is not reported. A copy of the Court of Appeal opinion is reprinted in Appendix B. On March 18, 1975, the Court of Appeal denied without opinion appellant's petition for rehearing. A copy of the order of denial is appended hereto as Appendix C.

On April 24, 1975, the California Supreme Court denied without opinion appellant's petition for hearing. A copy of the order denying the petition for hearing is copied at Appendix D to this Jurisdictional Statement. The proceedings became final as to the California Court of Appeal when it issued its remittitur on April 30, 1975.

JURISDICTION

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, was filed February 27, 1975. The proceedings did not become final until April 30, 1975 when the remittitur of the Court of Appeal issued after the California Supreme Court denied without opinion appellant's petition for hearing on April 24, 1975. Appellant seeks review by appeal (28 U.S.C. Section 1257(2)) by virtue of his due process attack on California Code of Civil Procedure

Section 415.20(b) (provision for substituted service of complaint in civil action) and its application to the facts of this case. Appellant was sued in the Superior Court of the State of California for the County of Los Angeles, but was never personally served with a copy of the summons and complaint. A default judgment was obtained after the process server purportedly complied with California Code of Civil Procedure, Section 415.20(b) (substituted service). Appellant appealed the judgment (which is permitted by California law) to the Court of Appeal of the State of California, Second Appellate District, Division Three, which affirmed. After the California Supreme Court denied a petition for hearing, and the Court of Appeal issued its remittitur, appellant duly filed his Notice of Appeal on May 12, 1975 with the Court of Appeal, pursuant to 28 U.S.C. Section 1257(2). A copy of the Notice of Appeal is included herein as Appendix E.

Cases believed to sustain jurisdiction include Mullane v. Central Hanover Bank, 339 U.S. 306, 314 (1950); Covey v. Somers, 351 U.S. 141 (1956); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Robinson v. Hanrahan, 409 U.S. 38 (1972); Walker v. Hutchinson, 352 U.S. 112 (1956); and Schroeder v. New York, 371 U.S. 208 (1962).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment and

California Code of Civil Procedure Section 415.20(b).

The Due Process Clause of the Fourteenth Amendment provides as follows:

> "No state shall . . . deprive any person of . . . property without due process of law . . . ."

California Code of Civil Procedure Section 415.20(b) provides as follows:

> "If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and of the complaint at such person's dwelling house, usual place of abode, or usual place of business in the presence of a competent member of the household or a person apparently in charge of his office or place of business, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing."

QUESTIONS PRESENTED

1. Does California Code of Civil Procedure Section 415.20(b), which authorizes "substituted" service in lieu of personal service upon a defendant in a civil breach of contract action when such defendant, a California resident, cannot "with reasonable diligence" be personally served, violate the Due Process Clause of the Fourteenth Amendment?

2. Is a civil defendant's Due Process right violated when he is not personally served with a copy of the summons and complaint in a state court civil proceeding to recover money damages for breach of contract where his residence is known and where he is not avoiding service, when the plaintiff's process server resorted to "substituted service" because on one occasion defendant was not home and on a second occasion a gate was locked, when such substituted service results in a default judgment against such defendant (appellant herein).

3. May a plaintiff in a state court civil proceeding for breach of contract who knows where the defendant is residing, resort to substituted service (i.e., leaving a copy of the summons and complaint with defendant's son and mailing another copy to the defendant's home) when plaintiff concedes that defendant was not avoiding service, and when plaintiff's purported attempt to exercise reasonable diligence in serving defendant personally consisted of one brief visit to the defendant's home to learn defen-

dant was not present, a second visit to find a gate locked, and a third visit to leave a copy of the summons and complaint with defendant's son? Does such service violate defendant's (appellant herein) Due Process right when it results in a default judgment against defendant?

STATEMENT OF THE CASE

Respondents filed a civil action in Los Angeles Superior Court against appellant on May 30, 1973 seeking monetary damages for breach of contract. Respondents' process server twice unsuccessfully attempted to serve appellant personally at his home in Los Angeles on June 27 and June 30, 1973. Once only appellant's son (over 18 years old) was there and the second time the outer gates were locked. After these two unsuccessful "attempts," which lasted only a few minutes (process server made no attempt to wait at premises or in vicinity), the process server believed appellant was not avoiding service. Notwithstanding the facts that appellant's residence was known and that appellant was not avoiding service, respondents' process server pursuant to California Code of Civil Procedure Section 415.20(b) (which permits substituted service only if personal service cannot "with reasonable diligence" be effected), on July 3, 1973 dropped copies of the summons and complaint at the feet of appellant's son (who denied it, contending he never received such documents) at appellant's residence, and on July 20, 1973 mailed additional copies to appellant's home (appellant denied having received them in the mail).

Later, respondents proceeded to obtain a default judgment based on this "substituted" service, appellant not having filed an answer to the complaint. The judgment awarded respondents $14,027.92.

Appellant appealed the default judgment to the Court of Appeal, which is specifically permitted by California law, Rooney v. Vermont Investment Corp., 10 Cal. 3d 351, 110 Cal. Rptr. 353, 515 P.2d 297 (1973); Sternbeck v. Buck, 148 Cal. App. 2d 829, 307 P.2d 970 (1957) (Appellant first moved to set aside the default, and appealed also from the order denying such motion, but that appeal is not before this Court; a default judgment rendered by a court without jurisdiction can be appealed directly, without there first being a motion to set it aside; under California law a defendant need not move to set aside a judgment rendered pursuant to invalid service; he can appeal such judgment directly).

The Court of Appeal addressed itself to the constitutional attack at page 8, footnote 7 of its opinion, holding the substituted service pursuant to the statute constitutional under Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Appellant raised the issue in his petition for hearing in the California Supreme Court, but that court denied review.

GROUNDS UPON WHICH IT IS CONTENDED FEDERAL QUESTIONS ARE SUBSTANTIAL

The issue in this case has never been resolved by this Court. Cf. Nowell v. Nowell, 384 F.2d 951 (5th Cir. 1967), cert. den. 390 U.S. 956 (1968). However, recent decisions of this Court have emphasized the two essential ingredients of procedural due process: 1) notice and 2) the opportunity to be heard. See, e.g., Wisconsin v. Constantineau, 400 U.S. 433 (1971).

This case presents this Court with its first opportunity to resolve an issue posed twenty-five years ago in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) regarding personal service in civil litigation. Specifically, this Court stated,

> "The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensible to the process due to residents, and it has more often been held unnecessary as to non-residents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. . . ."

In its earlier decision in McDonald v. Mabee, 243 U.S. 90, 92 (1917) this Court, in dictum, speculated that "perhaps . . . a summons left at his [defendant's] last and usual place of abode would have been enough" with respect to a defendant who departed the state.

This Court upheld service by mail on a nonresident owner of property located within the jurisdiction in Grannis v. Ordean, 234 U.S. 385 (1914). In Milliken v. Meyer, 311 U.S. 458 (1940) this Court upheld service of process on a nonresident who was personally served out of state.

Recent decisions of this Court have recognized the fundamental importance to due process of notice. See Covey v. Town of Somers, 351 U.S. 141 (1956), Walker v. City of Hutchinson, 352 U.S. 112 (1956), and Schroeder v. City of New York, 371 U.S. 208 (1962), all of which held the particular notice given to be deficient and in violation of the Due Process Clause of the Fourteenth Amendment.

In Walker v. City of Hutchinson, supra, this Court, referring to Mullane, said that "in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown." 352 U.S. at 116 (Emphasis added). By implication this Court appeared to say that when persons are neither missing nor unknown, and where their residences are known to be

in the state and they are residing there and not avoiding service, due process requires personal service. Such is the present case. This Court should note probable jurisdiction and render an opinion thereon.

In Robinson v. Hanrahan, 409 U.S. 38 (1972) this Court reversed a state civil judgment because the notice given was not "reasonably calculated" to apprise the appellant of the pendency of the proceedings.

More recently this Court reaffirmed its Mullane holding that due process requires the best notice possible under the circumstances, even if it means the lawsuit may not be pursued. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

It is respectfully submitted that the best notice possible under the circumstances herein, a resident present in the county in which the lawsuit is pending, whose residence is known and who is not avoiding service, who is being sued for over $14,000 in a breach of contract action, is personal service. The procews server may not resort to substituted service by contending that in making two brief trips to appellant's home he exercised "reasonable diligence." As so construed by the state courts, the statute is unconstitutional. A default judgment rendered by a state court based thereon cannot survive due process scrutiny.

This case presents this Court with an opportunity to clarify its prior holdings and to determine under what circumstances personal service is required or may be excused.

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction (or in the alternative grant certiorari) and reverse the judgment of the Court of Appeal of the State of California.

Respectfully submitted,

Roger Jon Diamond

Roger Jon Diamond

Attorney for Appellant

APPENDIX A

JUDGMENT OF THE CALIFORNIA SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

CHARLES FELDMAN and WILLIAM FELDMAN Plaintiff, vs. JERRY DI DONATO, et al., Defendants	No. C 58490 JUDGMENT BY COURT AFTER DEFAULT

This cause came on to be heard before Honorable Harold V. Boisvert, Judge Pro Tem presiding in Department 1A on November 19, 1973, SHAPIRO & MAGUIRE LAW CORPORATION, by E. W. Maguire appearing as attorney for plaintiff(s), and it appearing that defendant JERRY DI DONATO having been regularly served with process, having failed to appear and answer the plaintiff's complaint filed herein, and the default of said defendant having been duly entered and evidence having been introduced in open session of this Court:

It is therefore ordered, adjudged, and decreed that plaintiff(s) CHARLES FELDMAN and WILLIAM FELDMAN recover from said defendant the sum of $13,240.70, and attorney's fees in the sum of $787.22 total of $14,027.92, with plaintiff(s)

costs and disbursements amounting to the sum of $51.30, together with interest on said judgment as provided by law.

The Clerk is ordered to enter the judgment.

Dated: Nov 19 1973

/s/ Harold V. Boisvert
Judge Pro Tempore
Harold V. Boisvert

APPENDIX B

NOT TO BE PUBLISHED IN THE

OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHARLES FELDMAN, ET AL., Plaintiffs and Respondents, v. JERRY DI DONATO, Defendant and Appellant.

2D CIV.NO. 44384
Sup. Ct. No. C 58490

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. David N. Eagleson, Judge.
Affirmed.

Hecht & Diamond and Roger Jon Diamond for Defendant and Appellant.

Shapiro & Maguire Law Corporation and Jerome R. Kase for Plaintiffs and Respondents.

Defendant, Jerry Di Donato, appeals from (1) a judgment by default entered on November 20, 1973, in favor of plaintiffs, Charles and William Feldman; (2) a minute order denying Di Donato's motion, pursuant to Code of Civil Procedure section 473,[1] to set aside the judgment and the default; and (3) a subsequent minute order denying reconsideration of the first denial and a further motion, pursuant to section 473.5,[2] to set aside the default and the judgment.

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1. In relevant part this section reads: "The court may . . . relieve a party . . . from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

All section references hereafter are to the Code of Civil Procedure unless otherwise indicated.

Pursuant to California Rules of Court, Rule 12, subdivision (a), we have added the superior court file in this action (C 58490) to the record on appeal.

2. In relevant part, this section reads:

"(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him in such action, he may serve

The judgment and the orders are appealable. (See § 904.1, subds. (a), (b); 6 Witkin, Cal. Procedure (2d ed. 1971) Pt. I, Appeal, §§ 123, 94, pp. 4120, 4100-4101).

Stated broadly and generally, the fundamental question posed by this appeal is whether the trial court abused the discretion granted it by sections 473 and 473.5 in denying defendant's motions for relief thereunder, when apparently valid substitute service of the summons and complaint was made upon the defendant, the defendant and his counsel subsequently reviewed the summons and complaint, but then delayed over 90 days before moving to set aside the intervening default and default judgment. We hold that it did not, and that this appeal, at the very least, borders on the frivolous.

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and file a notice of motion to set aside such default or default judgment and for leave to defend the action . . . .

" . . . . . .

"(c) Upon a finding by the court . . . that his lack of actual notice in time to defend the action was not caused by his . . . inexcusable neglect, it may set aside the default or default judgment . . . and allow such party to defend the action."

On May 14, 1973, counsel for Feldman Construction Co., apparently the fictitious name for plaintiffs herein, wrote Di Donato, defendant herein, at a combination home and business address, advising him of his alleged failure to perform his subcontract with the Feldmans and that on May 17, 1973, the Feldmans would re-subcontract the work and hold Di Donato liable for any damages resulting therefrom. Di Donato could not recall on the stand, under inquiry by the court, whether he had received this letter, but in his proposed answer he expressly admitted its receipt. He likewise could not recall whether he had received a subsequent letter from this same counsel, dated June 26, 1973, to the same address, informing him that he would be subjected to the expenses required to effect personal service upon him of the summons and complaint in this action in view of his failure to respond appropriately to attempted service by mail of these documents on May 31, 1973, to the same address, pursuant to section 415.30. Di Donato denied having received them. He did admit, though, that he did receive on August 23, 1973, a copy of plaintiffs' premature request to the clerk to enter his default in this action,[3] but

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3. The request was premature because it was made before the 30 days had elapsed within which Di Donato might answer the complaint. The summons and complaint was mailed to Di Donato on July 20, 1973,

he did not know for sure whether he had received a copy of plaintiffs' second request to the clerk to enter his default, dated October 2, 1973, and containing in appropriate itemized form the total judgment sought of $14,079.22.[4] This irregularity that Di Donato experienced in receiving communications from plaintiffs' counsel, addressed to the same address, seems somewhat strange even in these days of an undependable postal service.[5]

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and, therefore, his time to answer did not expire before August 29. (§ 415.20, subd. (b).) The copy of plaintiffs' request that Di Donato received was incomplete in that it did not have the requisite facsimilies of plaintiffs' counsel's signatures thereon both as an attorney and as a declarant. We deem these irregularities, however, immaterial.

4. This copy of the second request was deficient in the same respects as the first. We again deem these deficiencies immaterial. The judgment rests upon this second default. The clerk's erroneous entry of this default as of the date of the first one is immaterial in view of the ministerial nature of the clerk's duty in this respect. (See 4 Witkin, Cal. Procedure (2d ed. 1971) Proceedings without Trial, § 139, pp. 2801-2802.)

5. Evidence Code section 641 creates a

The aforementioned substitute service of the summons and complaint in this action, pursuant to section 415.20, subdivision (b),[6] was accomplished by a professional process server dropping on July 3, 1973, copies of these documents in front of defendant's son, Peter, at the door of the previously mentioned combination home and business office, after informing Peter that he was thereby serving defendant with them and advising Peter briefly and generally of the nature of the documents left with him and that copies of these documents would thereafter be mailed to defendant at such address. Peter, a law

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rebuttable presumption that a letter, correctly addressed and properly mailed, is received in the ordinary course of mail.

6. This subdivision in pertinent part reads: "If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in Section . . . 416.90, a summons may be served by leaving a copy of the summons and of the complaint at such a person's dwelling house, usual place of abode, or usual place of business in the presence of a competent member of the household . . . at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to

student and apparently approximately 26 years of age, denied on the stand and otherwise that this had occurred, but the trier of fact evidently resolved this conflict in the evidence against him. This resolution is, of course, binding on us. (See Penland v. Goodman, 44 Cal. App. 2d 14, 16.) On July 20, 1973, pursuant to the just-mentioned section 415.20, subdivision (b), copies of the summons and complaint were mailed first class, postage prepaid, to the place where the other copies had been left with Peter.

Di Donato attacks the sufficiency of this substitute service essentially on two grounds. First, he claims that plaintiffs failed to show that they could not have "with reasonable diligence" personally delivered to him copies of the summons and the complaint before they resorted to substitute service upon him. This claim is meritless. The professional process server declared and testified in some detail that he twice unsuccessfully attempted to serve defendant personally at the aforementioned com-

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the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing."

bination home and business office on June 27 and June 30. Once only Peter was there and the second time the outer gates were locked.

Di Donato further attacks the sufficiency of the substitute service on the ground that too much time (17 days) elapsed between the dropping of the copies of the summons and complaint and the mailing of the copies and because the zip code was not included in the mailing address. But the subdivision does not set a time limit upon this subsequent mailing and the only requirement with respect to it is that it be "(by first-class mail, postage prepaid)." This ground, therefore, is likewise meritless.[7] We hold that the substitute service was valid.

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7. Di Donato also contends that this subdivision is unconstitutional. We hold otherwise because we regard it as prescribing a method reasonably calculated to provide notice to the person so served. (See Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314 [94 L.Ed. 865, 873].) He also points out that the original of the summons and of the complaint were not exhibited to Peter. This is not required by the subdivision.

Moreover, there is no doubt that at the end of August 1973, following Di Donato's aforementioned receipt of the premature request by plaintiffs to the clerk to enter his default, Di Donato, at the direction of his present counsel, had the official file of the action copied and then he and his present counsel reviewed the summons and the complaint. Neither, though, did anything of consequence thereafter to have the premature default set aside. Di Donato instead waited until about two weeks after the entry of the judgment on appeal on November 20, 1973, before seeking relief from the default and the judgment.[8] He acted then only because plaintiffs had applied to the appropriate court for the imposition of a lien in the amount of the judgment herein upon Di Donato's judgment in another case.

The neglect exhibited by Di Donato in this case was plainly inexcusable neglect within the meaning of both section 473 and section 473.5, subdivision (c). (Cf. Ludka v. Memory Magnetics International, 25 Cal. App. 3d 316, 321-322.) Independently of

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8. It will be recalled that in the meantime on October 2, 1973, a second request by plaintiffs to the clerk to enter Di Donato's default had been mailed to him. This was done pursuant to section 585, subdivision (2).

this, we hold that Di Donato had actual notice of the contents of the summons and the complaint from at least the end of August 1973, if not before then - by reason of the substitute service upon him about July 3, 1973. We may reach this result either by inferring actual notice to Di Donato through the substitute service or by equating the meaning of the words "notice" and "knowledge." Although these two words ordinarily have different meanings, nevertheless it has been repeatedly held that relief should not be granted under section 473.5 where the moving defendant had actual knowledge of the contents of the summons and complaint, regardless of whether he had notice of such contents. (See Pierson v. Fischer, 131 Cal. App. 2d 208, 212, and cases cited therein.)

Di Donato's final attack is on the judgment itself because it was rendered by a court commissioner sitting as a temporary judge pursuant to stipulation by plaintiffs through counsel.[9] Under the circumstances related,

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9. Pursuant to Evidence Code sections 459, 452, subdivisions (c) and (d), we judicially notice from a certified copy of an order of the presiding judge of the Los Angeles County Superior Court, provided us by respondents in their brief, that at the time of the judgment in question, the commissioner rendering the same had been assigned to the department in which he sat and had been appointed a temporary judge while sitting there.

the commissioner had jurisdiction to render judgment by default and such judgment is, therefore, valid. (See Cal. Const., art. VI, §§ 21, 22; § 259a, subd. (6); Sarracino v. Superior Court, 13 Cal. 3d 1, 5-7, 10.)

The judgment and orders under appeal are affirmed.

COBEY, J.

We concur:

ALLPORT, J.

POTTER, Acting P.J.

APPENDIX C

CALIFORNIA COURT OF APPEAL DENIAL OF PETITION FOR REHEARING

Los Angeles, Cal.

March 18, 1975

TITLE (FELDMAN, et al. vs. DI DONATO) No. 44385

PETITION FOR HEARING DENIED.

Clay Robbins, Clerk

APPENDIX D

CALIFORNIA SUPREME COURT DENIAL OF PETITION FOR HEARING

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102
APR 24 1975

I have this day filed Order

HEARING DENIED

In re 2 Civ. No. 44384

Feldman

vs.

Di Donato

Respectfully,

G.E. BISHEL
Clerk

APPENDIX E

APPELLANT'S NOTICE OF APPEAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

CHARLES FELDMAN, ET AL., Plaintiffs and Respondents, v. JERRY DI DONATO, Defendant and Appellant.	2D CIV. NO. 44384 Sup. Ct. NO. C 58490

NOTICE OF APPEAL

TO CLAY ROBBINS, JR., CLERK OF THE COURT OF APPEAL, AND TO CHARLES FELDMAN AND WILLIAM FELDMAN, PLAINTIFFS, AND TO SHAPIRO AND MAGUIRE AND JEROME R. KASE, THEIR ATTORNEYS:

PLEASE TAKE NOTICE that JERRY DI DONATO hereby appeals to the United States Supreme Court the decision of the Court of Appeal of the State of

California, Second Appellate District, Division Three, which was filed on February 27, 1975 and which became final as to that court on April 30, 1975. This appeal is being prosecuted pursuant to 28 U.S.C. Section 1257(2).

DATED: May 9, 1975.

ROGER JON DIAMOND
of HECHT & DIAMOND

By /s/ Roger Jon Diamond
Roger Jon Diamond
Attorneys for
Defendant and Appellant

Supreme Court, U. S.
FILED
AUG 1 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-115

JERRY DI DONATO,

Appellant,

vs.

CHARLES FELDMAN and
WILLIAM FELDMAN,

Appellees.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

APPEAL FROM
THE COURT OF APPFAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

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Attorneys for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

JERRY DI DONATO,

Appellant,

vs.

CHARLES FELDMAN and
WILLIAM FELDMAN,

Appellees.

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THERE IS AMPLE EVIDENCE TO SUPPORT THE CONCLUSION THAT APPELLANT ACTUALLY RECEIVED NOTICE OF THE PENDENCY OF THIS ACTION IN SUFFICIENT TIME TO MAKE AN APPEARANCE BEFORE THE DEFAULT JUDGMENT WAS ENTERED; THEREFORE, APPELLANT WAS AFFORDED DUE PROCESS (U.S. CONST., AMENDMENT 14, SECTION 1)	7
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975
No. _____

JERRY DI DONATO,
Appellant,
vs.
CHARLES FELDMAN and
WILLIAM FELDMAN,
Appellees.

MOTION TO DISMISS APPEAL
AND BRIEF IN SUPPORT THEREOF

Appellees move the Court, pursuant to Supreme Court Rule 16, to dismiss this appeal for lack of a substantial federal question, and in support thereof tender the following brief:

STATEMENT OF THE CASE

The Statement of the Case is fairly presented in the Section "Opinions Below", Appellant's Jurisdictional Statement, pp. 1-2.

STATEMENT OF THE FACTS

Appellant is a concrete subcontractor, who has conducted his business from 19448 Saticoy Street, Reseda, California, for a number of years. That address is a combination home and business, and is also used by appellant's adult son.

On March 27, 1973, appellant entered into a subcontract with appellees to do the concrete work on a project in Los Angeles. That subcontract contained a paragraph permitting appellees to take over appellant's work if his work was in any respect unsatisfactory.

Subsequently, appellant failed to complete the work. So, pursuant to the subcontract, appellees sent him a written notice to complete the work or be replaced, on or about May 8, 1973. It was followed by a similar demand from appellees' counsel on May 14, 1973. In the letter from appellees' counsel, appellant was advised that, unless he returned to the project and finished his work, he would be sued for the damages caused appellees in having to take over and finish appellant's portion of the project.

Appellant admitted receiving a copy of this letter.

Appellant failed to return to the project; so, on May 17, 1973, appellees entered into a subcontract with another to finish the concrete work. Two weeks later, on May 30, 1973, the instant action was commenced.

The next day, on May 31, 1973, mail service pursuant to California Code of Civil Procedure §415.30 was attempted, by mailing a copy of the Summons, Complaint and a Notice and Acknowledgement of Receipt to appellant. Appellant denies receiving this communication. On June 26, 1973, a follow-up letter was mailed to appellant. Appellant could not remember whether he received this letter.

Thereafter, a licensed private investigator made three attempts to personally serve appellant with the Summons and Complaint. The first attempt occurred on June 27, 1973 at approximately 9:10 p.m. Appellant's adult son was home and informed the process server that appellant lived there, but that he kept irregular hours and was not in. The son said he

did not know when appellant would return.

The process server next attempted to personally serve appellant on June 30, 1973, at about 8:40 a.m. At that time he found the gates entering into the property to be locked, and he could not gain admission to approach the house.

The third attempt to personally serve appellant occurred on July 3, 1973, at approximately 10:55 a.m. This time the process server again found appellant's adult son at home, but not appellant. He informed the son that he was there to serve process on appellant; the son refused to accept the documents, so the process server dropped them at the son's feet. The son later denied this incident, but the trial court resolved this conflict in the evidence against appellant. That resolution of the conflict was binding on the California Appellate Court (Opinion, Appellant's Jurisdictional Statement, page B7), and also should be binding on this Court. Seventeen days later the process server mailed a copy of the Summons and Complaint to appellant, as required by the California Code of Civil

Procedure. Appellant denied getting this mailing.

On August 22, 1973, the first Request to Enter Default was served by mail on appellant. He admitted receiving this document. In fact, the very next day, on August 23, 1973, he called the office of appellees' attorneys, and, being unable to speak to an attorney, left a message with one of the secretaries.

On August 29, 1973, another civil trial, in which appellant was plaintiff, commenced in the Los Angeles County Superior Court. Apparently, on August 30, 1973, appellant showed the first Request to Enter Default in the instant case to his attorney in the other case; that attorney instructed appellant to go to the Clerk's office to get a copy of the entire file. Appellant did so, showed it to his attorney and they discussed the matter.

On October 2, 1973, the jury returned a substantial verdict in favor of appellant in his other civil case. On that same day a second Request to Enter Default in the instant case was served by mail on him. Appellant could not remember whether

he received the second Request to Enter Default, but admitted that he may have.

On November 10, 1973, appellees proved up their case and obtained the judgment now involved in the instant appeal.

Thereafter, appellees filed a lien against appellant's judgment in the other civil action, which lien immediately came to the attention of appellant's attorney, who then brought it to the attention of appellant. At that point the instant case suddenly became very important to appellant. On December 3, 1973, appellant filed his first Motion to Set Aside the Default and the Default Judgment. That Motion and a subsequent Motion were denied.

SUMMARY OF THE ARGUMENT

There is ample evidence to support the conclusion that appellant actually received notice of the pendency of this action in sufficient time to make an appearance before the default judgment was entered; therefore, appellant was afforded due process (U. S. Const., Amendment 14, Section 1.)

ARGUMENT

THERE IS AMPLE EVIDENCE TO SUPPORT THE CONCLUSION THAT APPELLANT ACTUALLY RECEIVED NOTICE OF THE PENDENCY OF THIS ACTION IN SUFFICIENT TIME TO MAKE AN APPEARANCE BEFORE THE DEFAULT JUDGMENT WAS ENTERED; THEREFORE, APPELLANT WAS AFFORDED DUE PROCESS (U.S. CONST., AMENDMENT 14, SECTION 1).

After reviewing all the communications to appellant in this case, from the first letter to him threatening suit before it was even filed, through the Request for Entry of Default which he admitted receiving, the California Court of Appeals observed.

> "This irregularity that Di Donato [appellant in the instant appeal] experienced in receiving communications from plaintiffs' counsel, addressed to the same address, seems somewhat strange even in these days of an undependable postal service." (Opinion, Appellant's Jurisdictional Statement, p. B5.)

At this point the California Court of Appeal inserted footnote 5 which reads:

> "Evidence Code Section 641 creates a rebuttable presumption that a letter, correctly addressed and properly mailed is received in the ordinary course of mail." (Opinion, Appellant's Jurisdictional Statement pp. B5-6.)

It is clear from this and other discussions in the Opinion of the California Court of Appeal, e.g., "We hold...that this appeal, at the very least, borders on the frivolous...." (Opinion, Appellant's Jurisdictional Statement, page B3; see also first paragraph of the Opinion at Appellant's Jurisdictional Statement, page B9) that the California Court of Appeal determined that appellant actually received notice of the pendency of this action--either from the service of the Summons and Complaint or though the various mailings addressed to him--prior to the time the default judgment was entered, therefore, in sufficient time to make an appearance in this case.

The due process clause of the United States Constitution does not prescribe a particular manner within which a litigant is to receive notice of pending litigation. As this Court stated in Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action.... The notice must be of such nature as reasonably to convey the required information... and it must afford a reasonable time for those interested to make their appearance.... But if with due regard to practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

The California trial and appellate courts determined that appellant actually received notice of the pendency of this action in sufficient time to make an appearance before the default judgment was entered, and that finding is sufficient to sustain the judgment.

Hence, the dispute turns on a finding of fact which was determined adversely to appellant, and which in any event, is not significant enough to raise a substantial federal question about due process.

CONCLUSION

For the foregoing reasons, appellees urge that the Motion to Dismiss the Appeal be granted.

Respectfully submitted,

SHAPRIO & MAGUIRE LAW CORPORATION

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